

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>EDWARD H. SEGUINE</b>	:	<b>DETERMINATION</b>
		<b>DTA NO. 816092</b>
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1991 through November 30,	:	
1993.	:	

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Petitioner, Edward H. Seguire, 137-08 Centerville Street, Ozone Park, New York 11417, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1991 through November 30, 1993.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 19, 1998 at 10:15 A.M., which date commenced the six-month period for issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

***ISSUES***

I. Whether petitioner proved that he did not receive a notice of determination properly mailed to him by the Division of Taxation.

II. Whether, if petitioner did not receive the Notice of Determination, he is entitled to a conciliation conference, although a request for conference was not mailed within 90 days of the mailing of a notice of determination to petitioner at his last known address.

***FINDINGS OF FACT***

1. The hearing in this matter followed an Order, dated February 19, 1998, which denied a motion for summary determination filed by the Division of Taxation (“Division”). The Division sought a determination in its favor and dismissal of the petition on the basis that petitioner failed to file a request for a conciliation conference or a petition for a hearing within 90 days of the mailing of a notice of determination to him at his last known address. In opposition to the motion, petitioner claimed that he never received the notice and, therefore, that the time period for filing a request for a conciliation conference did not start to run until he became aware of the existence of an assessment. This Administrative Law Judge found that the Division proved the mailing of the notice of determination to petitioner at his last known address, creating a rebuttable presumption of receipt. However, it was also found that petitioner submitted enough evidence to raise triable issues of fact regarding his claim that he never received the notice of determination, and a hearing was scheduled to resolve this issue.

2. On September 6, 1994, the Division mailed a Notice of Determination of sales and use taxes due (Notice number L-009457754-9), to petitioner, Edward Seguire. Petitioner does not dispute this fact. Therefore, it is not necessary to review the evidence of mailing which was submitted with the motion on summary determination. The Findings of Fact of the Order related to the Division’s mailing of the Notice of Determination (Findings of Fact “6” through “16”) may be deemed to be incorporated into this determination by this reference.

3. On April 29, 1997, almost three years after the mailing of the notice, petitioner filed a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). The request was made on a Tax Compliance Division form entitled Payment Document (DTF-968.4), but it was mailed directly to BCMS by United States Postal

Service (“USPS”) certified mail. Petitioner enclosed a copy of a Consolidated Statement of Tax Liabilities, dated April 21, 1997, listing the sales tax assessment in issue. In a cover letter addressed to BCMS, petitioner stated that he had no previous knowledge of the sales tax liability shown on the consolidated statement and was never given an opportunity to dispute the assessment. Petitioner’s address as shown on the Payment Document is 137-08 “Sentreville” [sic] Street, Ozone Park, New York 11417.

4. BCMS issued to petitioner a Conciliation Order Dismissing Request, dated May 30, 1997, denying his request for a conference, on the ground that a request for a conference was not made within 90 days of the issuance of the statutory notice.

5. The Notice of Determination was mailed to petitioner’s last known address: 8 Long Meadow Road, Commack, New York. The Division submitted the affidavit of Brian Digman, Assistant Director in the Personal Income Tax Returns Processing Bureau. Mr. Digman oversees the analysis and testing of computer systems which process tax return information. Based on his personal knowledge, he states that the computer systems store information derived from various sources including the tax returns of individual taxpayers. Information from such returns, including the taxpayer’s address, is stored in a record format in the Returns Processing Database. Mr. Digman is familiar with the computer generated printouts of information taken from these individual tax returns. Attached to Mr. Digman’s affidavit as Exhibit “A” is such a printout. It is a computer record of an application for an extension to file a tax return, filed by Edward and Anita Seguire for the tax year 1993. The address shown is 8 Long Meadow Road, Commack, New York 11725-1764. The filing date is shown as April 15, 1994, but the actual date of mailing of the application is unknown.

6. The Division submitted a 1993 New York State personal income tax return filed by petitioner with the Division. The date of filing is not known; however, the return was dated by the preparer (Joan Barnett, C.P.A.) on December 17, 1996. The return is signed by petitioner, but his signature is undated. The return shows an address of 137-08 Sentreville Street, Ozone Park, New York 11417. Thus, at the time the Notice of Determination was issued the only address for petitioner in the Division's records was in Commack, New York.

7. The residence located at 8 Long Meadow Road, Commack, New York was owned by petitioner's brother-in-law and sister-in-law, Jack and Sharon Posemsky. In the middle of August 1994, petitioner was informed that the property had been sold and that he would have to vacate the premises. The actual date of closing was September 8, 1994. Since petitioner had little advance notice of the sale of the residence, he had little time to find a rental for himself and his family. Consequently, he made arrangements to live with his mother-in-law and father-in-law, Robert Posemsky, until he could secure a more permanent living arrangement. Petitioner moved out of the Commack, New York residence on September 8, 1994.

8. Petitioner lived with his in-laws for only a couple of weeks, then he moved himself and his family to a rental in Massapequa, New York. He later moved to his current residence in Ozone Park. Petitioner did not leave a forwarding address with the United States Postal Service after leaving the Commack residence, and he received no mail during the period in which he resided with his in-laws.

9. A letter from Jack Posemsky's attorney, Fred M. Schwartz, to Long Island Lighting Company, dated September 6, 1994, states: "Pleased be advised that Mr. Posemsky has contracted to sell the above-referenced premises. The closing is scheduled for September 8, 1994."

10. On September 21, 1994, a deed was recorded in the Office of the Clerk of the County of Suffolk transferring the property located at 8 Long Meadow Road, Commack, New York from Jack and Sharon Posemsky to an unrelated third party. Petitioner also submitted a copy of the deed. Although it is mostly illegible, enough can be read to establish that the subject deed was registered in Suffolk County and the real property tax verification was made on September 20, 1994.

11. The Division's own records do not indicate that the certified mail sent to petitioner on September 6, 1994 was returned as undeliverable. In an affidavit, Ida Gorman, the Supervisor of the NIXIE Unit in the Division's Registration and Data Services Bureau, states that after a review of the Division's records she determined that those records do not show that Notice of Determination L009457754 was returned to the Division. The Nixie Unit receives returned mail from the Division's Mail Processing Center and enters a "NIXIE flag" into the Division's computerized address record when documents mailed to a taxpayer are returned to the Division. There are no NIXIE flags in petitioner's address record.

### ***CONCLUSIONS OF LAW***

A. At the time the Notice of Determination in this matter was issued, September 6, 1994, section 1138(a)(1) of the Tax Law provided, as pertinent:

If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. . . . Notice of such determination *shall be given* to the person liable for the collection or payment of the tax. (Emphasis added.)

Tax Law § 1147(a)(1) provides:

Any notice authorized or required under the provisions of [Article 28] may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by

him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.

These provisions of the Tax Law were construed by the Appellate Division, Third Department, in *Matter of Ruggerite, Inc. v. State Tax Commn.* (97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). The Court held that the proper mailing of a notice of determination to a taxpayer at his or her last known address creates a presumption of receipt which may be rebutted with proof that the notice was never received.<sup>1</sup> Where the presumption of receipt is successfully rebutted, the 90-day time period for requesting a conference in the BCMS or a hearing under section 1138 of the Tax Law is not triggered, and a petitioner is entitled to a conference or a hearing (*Matter of Ruggerite, Inc. v. State Tax Commn; supra; Matter of Karolight, Ltd.*, Tax Appeals Tribunal, February 8, 1990).

In my previous order, I concluded that the Division mailed the notice of determination to petitioner at his last known address, creating a rebuttable presumption of receipt. Therefore, the burden of proof was on petitioner to establish that he did not receive the notice of determination.

B. I conclude that petitioner carried his burden of proof. Petitioner credibly testified that he did not receive the Notice of Determination. The facts and circumstances surrounding his sudden change of residence two days after the notice was mailed to him lend credibility to his denial of receipt. Documentary evidence establishes that the residence at 8 Long Meadow Road,

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<sup>1</sup> Tax Law § 1138(a)(1) has since been amended and now provides for the mailing, rather than the giving, of notice to persons liable for collection or payment of the tax at that person's last known address; in addition, such a notice becomes a fixed and final assessment unless a petition is filed within 90 days (L 1996, ch 267 §§ 1,3, applicable to tax years commencing on or after January 1, 1997). Thus, the presumption of receipt contained in Tax Law § 1147(a)(1) is now irrebutable.

Commack, New York, was sold to an unrelated third party as petitioner claims. The transfer of the real property on September 8, 1994 was also proven by documentary evidence. The testimony of petitioner's father-in-law, Robert Posemsky, supports petitioner's claim that the move from Commack was sudden and that petitioner lived with his in-laws for a short period before moving to a new address. The fact that petitioner did not reside at the Commack address lends credibility to his claim that mail addressed to him in Commack never reached him. (*cf.*, ***Matter of Nelloquet Restaurant, Inc.***, Tax Appeals Tribunal, March 14, 1996).

The Division submitted evidence that the Notice of Determination addressed to petitioner in Commack was never returned to the Division. This evidence does not prove that petitioner received the notice, merely that the United States Postal Service did not return it to the Division. Petitioner was not required to prove or disprove every possible scenario relating to the notice. He was only required to prove by clear and convincing evidence that he did not receive it. To carry this burden, credible testimony under oath coupled with supporting documentation is sufficient (*cf.*, ***Matter of Nelloquet Restaurant, Inc.***, *supra*).

C. Inasmuch as petitioner never received the Notice of Determination, the 90-day period for filing a petition with the Division of Tax Appeals or a request for a conference with the BCMS never began to run, and petitioner's request for a conciliation conference, mailed on April 29, 1997 was timely.

D. The request for a conciliation conference filed by Edward H. Seguire with respect to the Notice of Determination dated September 4, 1994 is granted, and the matter is to be returned to BCMS for a conference on the merits of petitioner's claim.

DATED: Troy, New York  
October 8, 1998

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE